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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. _____

JERRY D. HARDY,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Bismarck ND 58502-0001
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47 pp

QUESTION PRESENTED FOR REVIEW

I.

Whether the decision that Jerry D. Hardy did not fall within the jurisdiction of the Merit Systems Protection Board because he was demoted while serving a supervisory probationary period, and because his demotion was not based on marital status or partisan political reasons is correct.*

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*The parties to these proceedings are Jerry D. Hardy and the Merit Systems Protection Board.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Robert O. Wefald, a member of the Bar of the Supreme Court since the 13th day of September, 1976, on behalf of Jerry D. Hardy, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

Initial decision of Administrative Judge Steven L. Chaffin, filed August 12, 1992. Appendix A.

Decision of the Merit Systems Protection Board dated November 19, 1992. Appendix B.

Decision of the United States Court of Appeals for the Federal Circuit decided on January 5, 1994. Appendix C.

STATEMENT OF JURISDICTION

The jurisdiction of the Supreme Court is invoked pursuant to 28 USC 1254(1) to seek a review of the decision of the United States Court of Appeals for the Federal Circuit decided January 5, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution - Fifth Amendment:

> No person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb, nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without

due process of law; nor shall private property be taken for public use without just compensation. (Emphasis supplied).

STATEMENT OF THE CASE

Jerry D. Hardy (HARDY), an employee of the Artesia Training Division, Federal Law Enforcement Training Center, Jnited States Department of the Treasury, was on May 5, 1991, promoted to the position of Chief of the Artesia Training Division. On May 4, 1992, shortly before 4:00 p.m., HARDY was provided with a letter demoting him from his position as Chief of the Artesia Training Division effective at 4:00 p.m. on May 4, 1992.

HARDY filed an appeal with the Merit System Protection Board, and the initial decision of the Administrative Law Judge found that HARDY did not meet the jurisdiction requirements in that he did not serve a full one-year supervisory probationary period in the position as Chief of the Artesia Training Division.

That initial decision was affirmed by the Merit System Protection Board, and the decision of the Merit System Protection Board was affirmed by the United States Court of Appeals for the Federal Circuit.

REASONS FOR GRANTING THE PETITION

The decision as to jurisdiction is clearly erroneous for two reasons which HARDY's attorney failed to argue at any stage of these proceedings. The interests of justice require that this case be summarily remanded for a factual determination on the question of whether or not the Merit System Protection Board's requirements of jurisdiction were met in the first instance.

At all stages of these proceedings, HARDY's attorney did not challenge the assumption of the Federal Law Enforcement Training Center that HARDY's one-year probationary period as a supervisory employee expired on May 4, 1992. In fact, HARDY served in his position as the Chief

of the Artesia Training Division for a full year consisting of 365 days, the 365th day of which year occurred on Sunday, May 3, 1992, due to the fact that in February 1992 there was a 29th day, 1992 being a leap year. Having completed 365 days in the position, HARDY completed the one-year probationary period and, thus, was entitled to the full protection of the review process of the Merit System Protection Board. When the matter is remanded for a factual determination, HARDY will demonstrate that the Federal Law Enforcement Training Center recognized a 365 day year and paid all of its employees on that basis.

Additionally, HARDY's attorney failed to point out that HARDY had already served a one-year probation in a supervisory position in an agency under the United States General Services Administration, the Federal Protective Service, since the position of the Chief of the Artesia

Training Center was specifically advertised in an announcement which provided, "Selectee will be required to serve a one-year probationary period as a supervisor, unless exempt based on previous completion of such probation or service in a supervisory position." When this case is remanded for a determination as to the facts surrounding the question of jurisdiction, HARDY will prove that he completed his probationary period as a supervisory Federal Protective Officer when he worked for the Department of the Treasury from June 7, 1971, through June 7, 1974. After a break in service, he was reinstated effective October 23, 1989.

CONCLUSION

The petition for a writ of certiorari should be granted, and on a summary basis this matter should be remanded to the Merit System Protection Board for a determination of the facts establishing

jurisdiction contrary to the conclusion of the Merit System Protection Board.

Respectfully submitted this 4th day of April, 1994.

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CERTIFICATE OF SERVICE

This revised Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit was served upon the respondent by mailing true and correct copies thereof to:

Mary L. Jennings
Deputy General Counsel
Merit Systems Protection Board
1120 Vermont Avenue N.W.
Washington DC 20419

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Assistant General Counsel
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Melissa A. Pollack
Attorney at Law
Merit Systems Protection Board
1120 Vermont Avenue N.W.
Washington DC 20419

Solicitor General
Department of Justice
Washington DC 20530

said documents having been placed in the United States mail, with sufficient postage affixed, this 13th day of April, 1994.

ROBERT O. WEFALD

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-3101

JERRY D. HARDY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: January 5, 1994

Before MAYER, RADER and SCHALL, Circuit Judges. MAYER, Circuit Judge.

Jerry D. Hardy appeals the decision of the Merit Systems Protection Board, No. DE315I920364-I-1, November 19, 1992,[1] in which the board held it had no jurisdiction to hear Hardy's appeal of the

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[1]The initial decision of the Administrative Judge was issued on August 12, 1992. On November 19, 1992, the board denied Hardy's petition for review and the initial decision became the final decision of the board.

termination of his appointment to a supervisory position with the Federal Law Enforcement Training Center in Artesia, New Mexico, because he was a probationary employee at the time. We affirm.

Background

On January 8, 1991, Hardy was assigned as the acting chief of the Artesia Training Division, Federal Law Enforcement Training Center, United States Department of the Treasury (agency). Prior to this, he had been a training instructor in the division. On May 5, 1991, Hardy was officially promoted to chief of the division, subject to a one year probationary period. On May 4, 1992, he was provided a letter signed by his supervisor, David McKinley, which said that he would be demoted to his former position as of that day at 4:00 p.m. However, when he received the notice of removal, he was on approved annual leave from May 4 at 10:00 a.m. until May 5 at

4:00 p.m. Nevertheless, his removal was effected.

Hardy appealed to the board, which informed him that his appeal raised a question about jurisdiction and provided him an opportunity to address the issue. The board declined Hardy's request for a hearing because he had raised no facts, which if proved, would establish jurisdiction.

The board held that Hardy's probationary period would have ended on May 4,1992, at 5:00 p.m., regardless of the fact that he had acted as chief for 117 days prior to his official promotion and was on annual leave that day. Because the board concluded that the agency removed him on May 4, 1992, at 4:00 p.m., before the probationary period ended, it concluded that there was no jurisdiction to hear the case. This appeal followed.

Discussion

A probationary employee on initial appointment to a supervisory position who is removed to a nonsupervisory position has no right to appeal to the Merit Systems Protection Board unless the employee offers a nonfrivolous allegation that removal was based on partisan political reasons or marital status. 5 U.S.C. § 7511(a)(1); 5 C.F. R. § 315.908.[2] Hardy does no so allege; instead, he contends that he was not a probationary employee when he was demoted. To show this, and establish board jurisdiction, Hardy must prove that the agency's action did not become effective before the end of his probationary period. For the reasons

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[2] Section 315.908 provides:

(a) An employee who, in accordance with the provisions of this subpart, is assigned to a nonmanagerial or nonsupervisory position, has no appeal right.

(b) An employee who alleges that an agency action under this subpart was based on partisan political affiliation or marital status, may appeal to the Merit Systems Protection Board.

set out below, we agree with the board that Hardy did not sustain this burden.

Ordinarily, an employee's one year probationary period ends on the completion of the employee's tour of duty on the last day before the anniversary date of the employee's appointment. See Federal Personnel Manual (FPM) Ch. 315, § 8-4(d) (April 27, 1982). A "tour of duty" is an employee's regularly scheduled hours and days of duty. See FPM Ch. 296-33, Subch. 35 (January 8, 1993). Although the last day before his anniversary date was May 4, 1992, and his regularly scheduled tour of duty ended at 5:00 p.m., Hardy attempts to demonstrate that his probationary period ended at or sometime prior to 4:00 p.m. on May 4, 1992, the time at which the agency purported to demote him by the letter.

Hardy first argues that the probationary period ended on May 4, 1992, at 10:00 a.m., when he went on approved annual leave. He analogizes his case to

those in which the board has held that where an employee's anniversary date falls on a Monday, and the employee has no tours of duty on Saturday or Sunday, the probationary period ends at the close of his or her tour of duty on Friday. See, e.g., Hawkins v. Dept. of Treasury, 52 M.S.P.R. 686 (1992); Ibrahim v. Dept. of Agriculture, 51 M.S.P.R. 269 (1991). Without passing on the correctness of these cases, we reject Hardy's contention that annual leave is the same as weekend and holiday periods.

Hardy does not dispute that his regularly scheduled duty hours were Monday through Friday from 8:00 a.m. to 5:00 p.m., with one hour for lunch from noon to 1:00 p.m. He was required to request annual leave for his absence on May 4 and 5, 1992, specifically because he was scheduled to work on those days. His taking of annual leave did not alter the fact that he was regularly scheduled to

work until 5:00 p.m. on May 4, the day before his anniversary date. We see no error in the board's determination that Hardy's annual leave did not alter the end of his probationary period.

In the alternative, Hardy argues that the 117 days in which he acted as chief of the division prior to his official appointment to that position should be applied toward his probationary period. Office of Personnel Management regulations governing probation on initial appointment to a supervisory or managerial position refer to the Federal Personnel Manual for the conditions under which prior service is counted toward completion of a probationary period. 5 C.F.R. § 315.906 (1993).[3] Chapter 315 of the FPM covers

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[3] Section 315.906 provides:

(a) An employee who is reassigned, transferred, or promoted to another supervisory or managerial position while serving a probationary period under this subpart is subject to the probationary period prescribed for the new position. Service in the former position counts toward

career and career conditional positions generally, and subchapter 8 of that chapter governs probation. In turn, subchapter 8 refers to Appendix A for the rules applicable to prior service in connection with a probationary period. See FPM Ch. 315, §§ 8-21, 8-2f (Sept. 19, 1989).

Hardy argues that the board should have applied the test derived from Appendix A, and found that his prior service was creditable because it was

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> completion of the probationary period in the new position. If the former position was supervisory and the new position managerial, service counts in the manner prescribed by agency regulation.
>
> (b) The conditions under which prior service is otherwise counted toward completion of the probationary period will be published in the Federal Personnel Manual. [Emphasis added.]

Hardy does not assert that he was serving a prior supervisory or managerial position which was subject to a probationary period; accordingly, part (a) is inapplicable to him and his prior service counts only if provided for in the FPM.

rendered immediately preceding his official appointment, was with the same agency and was "in the same line of work." See FPM Ch. 315, App. A-3c (Sept. 19, 1989). However, we believe the provisions of Appendix A are not applicable to Hardy. Subchapter 9 of chapter 315 specifically covers probation on initial appointment to a supervisory or managerial position. While subchapter 8 refers to Appendix A for determining when service may be credited, subchapter 9 makes no reference to Appendix A, but provides its own rules for the crediting of prior service. See FPM Ch. 315 § 9-8 (Sept. 27, 1985). Because subchapter 9 carves out a special set of rules for probation on an initial appointment to a supervisory or managerial position, its provisions govern in this case, and the more general ones in subchapter 8 and, by reference, Appendix A, are inapplicable.

Section 9-8 deals with crediting service toward completion of the probationary period and provides in relevant part:

> **d. Temporary service prior to probation.**
> (1) Agency policy may provide for the crediting of temporary service in a supervisory or managerial position under temporary appointment, promotion or reassignment. Prior service under detail may be credited only when a detail to a supervisory or managerial position is made permanent without a break.

FPM Ch. 315 § 9-8d. Under section 9-8d then, whether temporary prior service may be credited toward the probationary period following initial appointment to a supervisory or managerial position is a matter of agency policy. Assuming that service in an acting capacity is "temporary service" within the meaning of section 9-8d, Hardy offers no evidence that agency policy allows the crediting of his service. To the contrary, the government submitted evidence that under

agency policy, his prior service should not be counted because it was not in excess of 120 days and was in an acting capacity.[4] We see no error in the board's agreement that Hardy's prior service should not be counted.[5]

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[4] Federal Law Enforcement Training Center (FLETC) Directive No. 64-00.A, ¶ 7.b (February 18, 1981) provides:

> Temporary service as a supervisor or manager immediately prior to the effective date of the probationary period requirement counts in the same way as service under a permanent appointment provided the individual was officially assigned to the position, e.g., a temporary appointment, promotion, or reassignment for a period in excess of 120 days. Service while on detail or in an acting capacity during the temporary absence of the regular supervisor or manager, does not count.

[5] The board apparently confused the provisions of subchapter 9, section 9-8d with those of section 9-4b(2). Section 9-4b(2) deals exclusively with determining whether an employee is exempt from serving a probationary period under subchapter 9 because he or she was already serving in a supervisory or managerial position when the regulation became effective on August 11, 1979. Section 9-4b(2) says nothing

Finally, Hardy maintains that his probationary period ended at 4:00 p.m. on May 4, the same time the agency purported to remove him. In light of our determination that his regular tour of duty was scheduled to end at 5:00 p.m., and that his annual leave did not alter the end of his probationary period, we find this argument unavailing.

Even if his probationary period ended at 5:00 p.m. on May 4, Hardy argues that his removal was not effective until after that time and date. He points to two factors in support -- that his Notification of Personnel Action, Standard Form (SF) 50, was not signed by the personnel officer until June 4, 1992 and that he continued to be paid at the rate of the chief position for a period of time

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about the crediting of prior service when an employee must serve a probationary period. That is governed by section 9-8. Despite this confusion, however, the board applied the right rule -- that temporary service must be in excess of 120 days and in other than an acting capacity.

after May 4. Neither of these arguments carries.

To remove a probationary employee from an initial supervisory position, an agency official with the proper authority must notify the employee in writing that he or she is being demoted from a supervisory position for reasons of supervisory performance. 5 C.F.R. § 315.907(c) (1993). Hardy's notice of termination was signed by McKinley on May 4, 1992, and informed him that he would be demoted as of 4:00 p.m. that day for reasons of supervisory performance. Hardy contends that this did not become effective until it was "ratified" by the SF-50, which was signed by the personnel officer and approved on June 4. Because McKinley had the authority to remove Hardy, however, the SF-50 was not required to render the removal effective.

Authority to demote a probationary supervisory employee was delegated by the

agency to that employee's immediate supervisor with concurrence by the next highest official in the organizational structure. Federal Law Enforcement Training Center (FLETC) Directive No. 64-00.A, ¶ 7.d. (February 18, 1981); FPM Ch. 315 § 9-6(c) (1993). McKinley was Hardy's immediate supervisor and the removal letter stated that the Deputy Director, FLETC, concurred in the action. By this writing, the agency, through McKinley, it authorized official, did all it had to do to remove Hardy effective May 4, 1992, at 4:00 p.m. No provision of the relevant statutes or regulations required the issuance of an SF-50 to render the removal effective. The ensuing SF-50 added nothing; it is merely an administrative record of the accomplished action. See NTEU v. Reagan, 663 F.2d 239, 342 (D.C. Cir. (1981).

That Hardy continued to be paid at the higher salary is irrelevant. In any

large organization, a personnel action triggers many administrative chores, ranging from processing the paperwork to alter an employee's salary, to making appropriate changes to a phone list. These chores likely involve many people and administrative levels. It defies common sense to expect that all such steps will be carried out simultaneously with the personnel action. As with the SF-50, the relevant question is whether the agency has taken all steps required by law to complete a personnel action, not whether every subsequent administrative detail has been fulfilled.

Hardy also argues that he should have had a hearing on the issues of his tour of duty, McKinley's authority to remove him, and the completion of his probationary period. "There is no statutory requirement that the Board hold a hearing on the threshold issue of jurisdiction." Wilson v. Merit Systems Protection Board,

807 F.2d 1577, 1582 (Fed. Cir. 1986). However, this court has held that a hearing is appropriate where a petitioner raises nonfrivolous issues of fact alleging jurisdiction which cannot be resolved simply on documentary evidence. Id. at 1583 (citing Manning v. Merit Systems Protection Board, 742 F.2d 1424, 1428 (Fed. Cir. 1984)). The documentary evidence in this case, however, was ample to resolve the issues Hardy posits. And he was afforded all the procedural protections and process to which he was entitled as a probationary employee.

Conclusion

Accordingly, the decision of the Merit Systems Protection Board is affirmed.

AFFIRMED

APPENDIX "B"

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER REGIONAL OFFICE

JERRY D. HARDY, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBER DE315I92036411 DATE: Aug 12 1992

Steven L. Murray, Esquire, Denver, Colorado, for the appellant.

Clinton R. Fitts, Esquire, Glynco, Georgia, for the agency.

BEFORE

Steven L. Chaffin
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant seeks reversal of the termination of his appointment to a supervisory position during the 1-year probationary period. See Appeal Record, Tab 1. This termination action was effective May 4, 1992.

The appellant was informed that his appeal raised an issue of Board jurisdiction and was given an opportunity to present evidence and argument on this issue.[1] See Appeal Record, Tabs 7 and 10. The appeal record was closed on July 9, 1992.[2] See Appeal Record, Tab 10.

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[1]When the agency responded to the appeal, it provided evidence showing the probationary nature of the appellant's supervisory appointment and moved for dismissal of the appeal. This evidence and argument was provided to the appellant prior to the close of the appeal record. See Webb v. Veterans Administration, 29 M.S.P.R. 649, 651 (1986); see also Burgess v. Merit Systems Protection Board, 758 F.2d 641, 643 (Fed.Cir. 1985). Thus, the appellant was aware of the specific jurisdictional issues involved in the appeal and had an opportunity to submit evidence on these issues.

[2]In the appeal the appellant requested a hearing. See Appeal Record, Tab 1. However, the hearing provided for in 5 U.S.C. § 77701(a)(1) is only convened in those cases in which the Board has jurisdiction or in those cases where the appellant alleges facts which, if proven, would establish Board jurisdiction. See Viloria v. united States Postal Service, 1 M.S.P.R. 697, 698 (1980); Murray v. Defense Mapping Agency, 1 M.S.P.R. 350, 351 (1980). Neither situation exits here.

For the reasons stated below, the appeal is DISMISSED as outside the Board's jurisdiction.

JURISDICTION

Factual background

The following facts are undisputed. The appellant was employed as a Training Instructor, GS-12, at the Federal Law Enforcement Training Center, Artesia, New Mexico. Between January and May 1992, the appellant "acted" as Chief of that facility for a total of 117 days. Then, on May 5, 1991, the appellant was formally promoted to the position of Chief, Artesia Training Division (ATD), GM-301-13, at the Training Center. See Appeal Record, Tab 7-4a. The appellant served in this GM-13 position until May 4, 1992. See Appeal Record, Tab 7-4b.

On May 4, 1992, the appellant was granted emergency annual leave for the days of May 4 and 5, 1992. See Appeal Record, Tab 7-4. However, at about 4:00

p.m. on May 4, 1992, the appellant received a letter demoting him from his position as Chief to the position of Training Instructor (Law Enforcement), GS-12. See Appeal Record, Tab 7-4a.

The appellant had not completed his supervisory probationary period at the time of his demotion

The appellant argues that he had completed his supervisory probationary period at the time of the agency's demotion action. Specifically, he contends that the agency's grant to him of annual leave on his "anniversary date" means that he had completed his probationary period. However, for the reasons stated below, I disagree.

The Board has previously held that for such an agency personnel action to be effective before the completion of the probationary period, it must occur prior to the end of the employee's tour of duty on the last day before the 1-year

anniversary date. See Ibrahim v. Department of Agriculture, 51 M.S.P.R. 269, 271 (1991). The appellant's regularly scheduled tour of duty was from 8:00 a.m. to 5:00 p.m., with a 1-hour lunch period. See Appeal record, Tab 7-4f. The appellant makes no claim here that he was on a flexi-time schedule, and thus, worked a different tour of duty. And, as noted above, the appellant received notice of his demotion at approximately 4:00 p.m., which was at least an hour before his tour of duty was to end.

The appellant argues that his grant of annual leave sets a new tour of duty. See appeal Record, Tab 12. However, nothing on the leave request itself suggests that a new tour of duty has been set. And, the leave request can be read to show that the appellant was scheduled to work until 5:00 p.m. on May 4.

That is, the appellant's leave request seeks 13 hours of annual leave for the period of 10:00 a.m. on May 4 to 4:00 p.m. on May 5. See Id. As constituted, the leave slip could provide for 6 hours of annual leave on May 4 -- 10:00 a.m. to 5:00 p.m. with 1 hour for lunch -- and for 7 hours of annual leave on May 5 -- 8:00 a.m. to 4:00 p.m. with 1 hour for lunch and a return to duty at 4:00 p.m. Thus, the leave request does not necessarily reset the end of the appellant's tour of duty.

Nothing on the leave slip or in any other evidence submitted by the appellant suggests that his tour of duty did not end at 5:00 p.m. on May 4. Thus, his supervisory probationary period did not end until that time. And, the agency notified him prior to the end of that probationary period that he was to be demoted from his supervisory position. This notification, while not cancelling

the appellant's leave, simply meant that any leave after 4:00 p.m. on May 4, would be paid at the lower GS-12 grade level.

The appellant next argues that by virtue of the fact that he "acted" in the Chief position for 117 days prior to his actual promotion to that position, he must be deemed to have completed his probationary period. In support of this claim, the appellant cites the recent Board holding in Aizin v. Department of Defense, 52 M.S.P.R. 146, 149 (1991). Again, however, based on the considerations below, I disagree.

I first note that Aizin involved the probationary period of a new appointment to the Federal service. In Aizin, the Board allowed credit towards completion of the 1-year initial probationary period. This service credit involved a period of temporary employment in the same position immediately prior to the career-

conditional appointment. The same circumstances do not exist here.

That is, in Aizin, the employee served in a position at the same grade and pay level. Here, however, the appellant has presented no evidence to show that he received a temporary promotion to the GM-13 grade level. See Julius v. Department of the Army, 35 M.S.P.R. 130, 134 (1987) (a detail to a supervisory position does not constitute an appointment to that position and does not count towards completion of the supervisory probationary period), aff'd, 852 F.2d 1293 (Fed.Cir. 1988) (Table); see also Ajmani v. Department of the Interior, 712 F.2d 1485, 1487-88 (D.C. Cir. 1983) (service in a position under a "detail" cannot be credited toward completion of probationary period).

Moreover, Federal Personnel Manual, Chapter 315, Subchapter 9-8d, provides that the agency may allow for such credit

if the employee was officially assigned to the supervisory position in excess of 120 days. Further, under that same FPM provision, service in an acting capacity does not count toward completion of the supervisory probationary period. See Julius, 35 M.S.P.R. at 134.

Here, the appellant, by his own admission, was temporarily assigned to the position and for only 117 days. Thus, the agency was not required to grant him credit toward his supervisory probationary period for this time served.

The appellant raises two other arguments in support of his claim. First, he argues that the issuance of the SF-50 documenting his demotion did not occur until June 1992, well after the completion of the probationary period. however, the belated issuance of this SF-50 is of no effect here. The evidence shows that the person with the authority to take the demotion action notified the appellant on

May 4, 1992, that the demotion was effected immediately. See Appeal Record, Tab 7-4b. The issuance of the SF-50 is a clerical documentation task which usually takes place well after the effective date of the action. See Vandewall v. Department of Transportation, 52 M.S.P.R. 150 (1991).

Finally, the appellant contends that the fact that the agency did not issue corrected leave and earning statements is further proof that he completed his probationary period. Again, however, this must be deemed an administrative or clerical task. The notification to the appellant on May 4 was the event which sets the time of his demotion. And, I note that the agency has taken action to recoup the overpayment made to the appellant.

The appellant's demotion during the supervisory probationary period is not within the Board's jurisdiction

A Federal employee may appeal to the Merit Systems Protection Board only those actions made appealable under law, rule or regulation. See 5 U.S.C. §7701. And, the employee has the burden of proof on the issue of jurisdiction. See 5 C.F.R. §1201.56(a)(2)(i)(1992).

Employees who suffer a demotion are entitled to appeal under 5 U.S.C. §§ 7511-7513, and when the demotion is for unsatisfactory performance, under 5 U.S.C. §4303. However, employees demoted while serving a supervisory probationary period are excluded from coverage by these statutes. See 5 U.S.C. §§ 4303(f)(2) and 7512(C). Thus, employees demoted while serving a supervisory probationary period -- as was the appellant -- have no statutory right of appeal to the Board. See Id.

However, supervisors who are demoted to non-supervisory or non-managerial positions during their 1-year probationary

period have a right to appeal to the Board, set forth in regulation, if they raise a non-frivolous claim that the demotion was based on marital status or for partisan political reasons. See 5 C.F.R. §315.908(a) and (b); see also Leahey v. Department of the Army, 8 M.S.P.R. 512, 513 (1981); Mendez v. U.S. Army, 5 M.S.P.R. 223, 225 (1981). Absent such a non-frivolous claim, the Board does not have jurisdiction to adjudicate the petition for appeal. See Leahey, 8 M.S.P.R. at 513; Mendez, 5 M.S.P.R. at 225.

Here the appellant has raised no contention that his demotion was based on his marital status or for partisan political reasons. See Appeal Record, Tabs 1, 12 and 13. Accordingly, this appeal doe snot fall within the Board's jurisdiction. See Leahey, 8 M.S.P.R. at 513; Mendez, 5 M.S.P.R. at 225.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /S/
Steven L. Chaffin
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on Sep 16 1992, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. you must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue NW, Suite 802
Washington DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached document(s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

Appellant

Jerry D. Hardy
302 West Grand Avenue
Artesia NM 88210

Appellant's Representative

Steven L. Murray
Attorney at Law
707 17th Street, Suite 2935
Denver CO 80202

Agency's Representative

Clinton R. Fitts, Esquire
Department of the Treasury
Office of Federal Law Enforcement
Training Center
Legal Counsel, Building 94
Glynco GA 31524

Other

Ms. Marjorie Marks
Office of Personnel Management
Employee Relations Division
1900 E Street N.W., Room 7412
Washington DC 20415

Aug 12 1992
(Date)

/S/
Vicky J. Boiko
Administrative Officer

APPENDIX "C"

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JERRY D. HARDY, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	)	DOCKET NUMBER DE3151920364-I-1 DATE: Nov 19 1992

Steven L. Murray, Esquire, Denver, Colorado, for the appellant.

Clinton R. Fitts, Esquire, Glynco, Georgia, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on August 12, 1992, because it does not meet the criteria for review set forth at 5 C.F.R. §1201.115. This is the Board's final order in this appeal. The initial

decision in this appeal is now final. 5 C.F.R. §1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. §7703(a)(1). you must submit your request to the court at teh following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington DC 20439

The court must receiev your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. §7703(b)(1).

FOR THE BOARD: /S/
Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today: By certified mail to:

Steven L. Murray, Esquire
707 17th Street, Suite 2935
Denver CO 80202

By regular mail to:

Jerry D. Hardy
302 West Grand Avenue
Artesia NM 88210

Clinton R. Fitts, Esquire
Department of the Treasury
Office of Federal Law Enforcement
Training Center
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Merit Systems Protection Board
Denver Regional Office
P.O. Box 25025
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By hand to:

Office of the Special Counsel
1730 M Street N.W.
Suite 300
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Nov 19 1992
(Date)

/S/
Robert E. Taylor
Clerk of the Board

Washington, D.C.

Supreme Court, U.S.
FILED
JUN 6 1994
OFFICE OF THE CLERK

No. 93-1621

In the Supreme Court of the United States

OCTOBER TERM, 1993

JERRY D. HARDY, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
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13 pp

QUESTION PRESENTED

Whether this Court should remand this case to the Merit Systems Protection Board to consider petitioner's factual contentions, not previously raised before the court of appeals or the Board, to support his claim that his demotion from his probationary supervisory position was invalid.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 13 F.3d 1571. The initial decision of the administrative judge of the Merit Systems Protection Board (Pet. App. A17-A32) and the order of the Board denying review (Pet. App. A33-A35) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1994. The petition for a writ of cer-

tiorari was filed on April 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND DIRECTIVE INVOLVED

Pertinent provisions of the Civil Service Reform Act of 1978, 5 U.S.C. 3321 and 4303, and Federal Law Enforcement Training Center Directive No. 64-00.A (Feb. 18, 1981) are reproduced in the appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

1. On May 5, 1991, petitioner Jerry D. Hardy was promoted to the position of Chief of the Artesia Training Division at the Federal Law Enforcement Training Center, United States Department of the Treasury (FLETC). His formal appointment (SF-50) form notified him that the promotion was "subject to completion of [a] one year probationary period * * * beginning 05-05-91." Pet. C.A. App. 21.

Before the end of petitioner's scheduled work day on May 4, 1992, the last day of his one-year probationary period, Hardy was notified that he had been demoted from that supervisory position. The demotion letter informed him that he had been demoted because, among other things, "[y]our leadership style has become increasingly dictatorial[,] * * * [y]ou have been unable to develop and maintain open lines of communication or professional relationships[,] * * * [y]our initiative and resourcefulness have slipped to an unacceptable level [and] * * * [y]ou lack the enthusiasm and flexibility to appropriately guide the division." Pet. C.A. App. 22.

2. Petitioner appealed the demotion to the Merit Systems Protection Board (MSPB), claiming a right

to review under provisions of the Civil Service Reform Act (CSRA) granting employees who suffer a demotion a right to appeal. See 5 U.S.C. 4303 (demotions for unsatisfactory performance), 7511-7513 (specifying procedures for adverse personnel actions). However, the CSRA specifically precludes MSPB jurisdiction over appeals by probationary supervisory employees contesting their demotions. See 5 U.S.C. 4303(f)(2) and 7512(C).

To avoid the jurisdictional bar to his appeal, petitioner argued that he was no longer a probationary employee at the time of his demotion. He contended that his probationary period had actually ended at 10:00 a.m. on May 4 (the day of his demotion), before he received the demotion letter, because he had been approved for annual leave to begin at that time and to continue through May 5. Pet. App. A21-A22. He also contended that his 117 days of service as acting chief of the division prior to his appointment to that position should be applied towards his probationary period. *Id.* at A23-A25. The administrative judge rejected both arguments, noting that the grant of annual leave does not imply that a new tour of duty has been set (*id.* at A21), and that the Federal Personnel Manual (FPM) does not require agencies to count periods of acting service in supervisory positions towards completion of the probationary period (*id.* at A24-A25). The full MSPB denied review. *Id.* at A33-A34.

3. The court of appeals affirmed. Pet. App. A1-A16. The court agreed with the MSPB that "[petitioner's] taking of annual leave did not alter the fact that he was regularly scheduled to work until 5:00 p.m. on May 4, the day before his anniversary date." *Id.* at A6-A7. The court also rejected petition-

er's contention that FLETC was required, under FPM Chapter 315, Subchapter 8, to apply his 117 days of service as acting chief towards completion of his probationary period as chief of the division. Pet. App. at A7-A8. The court held that the more specific provisions of Subchapter 9, covering probation on initial appointment to a supervisory position, applied rather than Subchapter 8, which covers probationary appointments generally. Pet. App. A9. Subchapter 9 grants agencies discretion in counting acting service, providing only that "[a]gency policy *may* provide for the crediting of temporary service in a supervisory or managerial position" towards the completion of the probationary period. Pet. App. A10 (emphasis added). FLETC policy, providing that "[t]emporary service as a supervisor" counts towards the completion of the probationary period only if the temporary service was in excess of 120 days, *id.* at A11 n.4, did not cover petitioner, who had served as acting chief for 117 days. Therefore, the court of appeals affirmed the MSPB's conclusions that petitioner was still a probationary employee when he was demoted, and that the MSPB had no jurisdiction over his appeal. *Id.* at A2.[1]

4. Since the court of appeals' decision, petitioner has hired a new attorney, who raises new factual arguments not made before either the MSPB or the

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[1] The court of appeals also rejected petitioner's contention (Pet. App. A13-A15), as had the administrative judge (*id.* at A25-A26), that his demotion did not actually occur until after the completion of his probationary period. This contention was based on the fact that petitioner did not receive paperwork on his demotion until June, 1992, and that he continued to be paid the salary of the higher grade in the interim.

court of appeals, and who asserts that this case should be remanded to the MSPB to consider these new arguments. Specifically, petitioner contends that, because petitioner's probationary period fell during a leap year, the end of that period actually occurred on May 3, 1992, the 365th day of the probationary period and the day before he was demoted, and not May 4, 1992, the day before the anniversary date of his service. Pet. 4-5. Petitioner also contends that FLETC should have counted his previous service in a supervisory position in the General Services Administration towards the one-year period. Pet. 5-6.

ARGUMENT

1. Petitioner concedes that he is raising new factual arguments that his attorney failed to raise below, and he does not contend that the court of appeals or the Board incorrectly resolved any of the issues that he presented to them. This Court ordinarily will not consider a claim not raised or addressed below. *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1531 (1992). The petition presents no important or recurring issue, and no interests of judicial administration would be served by permitting petitioner to raise the arguments here for the first time. Cf. *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980).

Petitioner nevertheless asserts that the interests of justice require that this case be summarily remanded to the MSPB. Pet. 4. However, as recently as last year, this Court reiterated that "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer Investment Services Co.* v. *Brunswick Associates Limited Partnership*, 113 S. Ct. 1489, 1499 (1993). The considerations underlying this prin-

ciple were set forth by this Court more than thirty years ago:

> There is certainly no merit to the contention that dismissal of [petitioner's] claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Link v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962). As *Link* makes clear, petitioner is not completely without a remedy: "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." *Id.* at 634 n.10.

2. This case does not present any compelling circumstance warranting the remand that petitioner seeks. Petitioner contends that FLETC should have counted his prior service in a probationary position at the General Services Administration. But FLETC Directive No. 64-00.A (Feb. 18, 1981), governing probationary periods for newly appointed managers and supervisors, makes clear that the time for petitioner to make this argument was when he was appointed, not when he was terminated. Section 7.a of that Directive provides in pertinent part:

> Applicability of the probationary period requirement to the individual as it relates to this

> directive is a [FLETC] determination. In the absence of records which clearly support an individual's claim that he or she should be exempt from the requirement because of previous service in a supervisory or managerial position, [FLETC] can require the individual to serve a probationary period. An employee who believes he or she has served in a sup rvisory or managerial position as defined by this directive and who wishes to contest [FLETC's] determination may do so under [FLETC's] grievance procedure. By regulation, there is no right of appeal to the Merit Systems Protection Board.

Petitioner's remedy, therefore, was to invoke FLETC's grievance procedure when FLETC required him to serve a probationary period as a supervisor.

As for petitioner's leap year argument, we have found nothing in the FPM that specifically addresses this issue, nor have we found any other authority that bears directly on it. The court of appeals noted that, under an earlier version of the FPM, an employee's "one year probationary period ends on the completion of the employer's tour of duty on the last day before the *anniversary date* of the employee's appointment." Pet. App. A5 (emphasis added). Although it is not clear that this provision governs petitioner's case,[2] it does tend to suggest that the "year"

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[2] Chapter 315, Subchapter 8 of the FPM was amended by the Office of Personnel Management on February 18, 1992, during petitioner's probationary service, and the section cited by the court of appeals no longer appears in the FPM. Moreover, as the court of appeals also noted (Pet. App. A9), the more specific provisions of Subchapter 9 cover probationary service in supervisory positions. We are not aware of any provision in Subchapter 9 specifically addressing the leap year issue.

of probationary service is a calendar year, not 365 days. There is no apparent reason, moreover, why petitioner could not have raised this argument below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1994

APPENDIX

1. Section 303(a) of the Civil Service Reform Act of 1978 as amended, 5 U.S.C. 3321, provides in pertinent part:

(a) The President may take such action * * * as shall provide as nearly as conditions of good administration warrant for a period of probation—

* * * (2) before initial appointment as a supervisor or manager becomes final.

(b) An individual—

(1) who has been transferred, assigned, or promoted from a position to a supervisory or managerial position, and

(2) who does not satisfactorily complete the probationary period under subsection (a)(2) of this section, shall be returned to a position of no lower grade and pay than the position from which the individual was transferred, assigned, or promoted.

2. Section 203(a) of the Civil Service Reform Act of 1978 as amended, 5 U.S.C. 4303, provides in pertinent part:

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance. * * * * *

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title.

3. Section 7 of Department of the Treasury Federal Law Enforcement Training Center Directive No. 64.00.A (Feb. 18, 1981) provides:

a. Applicability of the probationary period requirement to the individual as it relates to this directive is a Center determination. In the absence of records which clearly support an individual's claim that he or she should be exempt from the requirement because of previous service in a supervisory or managerial position, the Center can require the individual to serve a probationary period. An employee who believes he or she has served in a supervisory or managerial position as defined by this directive and who wishes to contest the Center's determination may do so under the Center's grievance procedure. By regulation, there is no right of appeal to the Merit Systems Protection Board.

b. Temporary service as a supervisor or manager immediately prior to the effective date of the probationary period requirement counts in the same way as service under a permanent appointment provided the individual was officially assigned to the position, e.g., a temporary appointment, promotion, or reassignment, for a period in excess of 120 days. Service while on detail or in an acting capacity during the temporary absence of the regular supervisor or manager, does not count.

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